F. M. S.

[APPELLATE CIVIL JURISDICTION]

THOMAS, C.J. (F.M.S.), GERAHTY and MCFALL, JJ.

December 12, 1933.

MOONA SOWMIAN.....Defendant-Appellant

v.

MEYAPPA CHETTIAR.....Plaintiff-Respondent

[PERAK CIVIL APPEAL No. 16 of 1933]

Small Holdings (Restriction of Sale) Enactment No. 8 of 1931—Lapse of Enactment—Survival of powers rights and liabilities derived from the Enactment in regard to an order for sale subject to the Enactment prior to its lapse.

On 17th July 1933 the Plaintiff obtained judgment for the sum due on a promissory note together with an order for sale of the defendant's lands under section 134 of the Land Code, 1926.

The lands affected were Small Holdings within the meaning of The Small Holdings (Restriction of Sale) Enactment No. 8 of 1931, by virtue of Section 3 of which the Order for Sale was made subject to the consent of the Ruler in Council.

On 20th July 1933 Enactment No. 8 of 1931 lapsed.

On 15th September 1933 the Registrar ordered that the lands should be offered for sale without reference to the Ruler in Council.

Held that the order of sale remained as it commenced subject to the consent of the Ruler of the State in Council,

Held, further that the duties imposed and the powers conferred by the Enactment remained in being after its lapse in regard to rights and liabilities which had accrued prior to the lapse.

Decision of Mudie, J. reversed by a majority, MacFall, J. dissenting.

The Defendant appealed from the order of the Registrar dated the 15th September 1933 to the Judge in Chambers.

J. Dunford Wood for Defendant-Appellant.

Yeoh Cheang Lee for Plaintiff-Respondent.

Cur. Ad. Vult.

MUDIE, J.—On the 17th July, 1933, the Plaintiff obtained judgment against the defendant for a sum of $26,863.50, a declaration of lien over certain lands, which are said to be small holdings and an order for their sale.

It is provided by Section 3 of "The Small Holdings (Restriction of Sale) Enactment, 1931," that—

> "3 (i) All Orders of sale of Small Holdings made under sections 142, 149 and 134 (i) of 'The Land Code, 1926,' or under section 303 of 'The Civil Procedure Code, 1918" shall notwithstanding anything contained in the said Enactments, be subject, after the commencement of this Enactment, to the consent of the Ruler of the State in which the small holding is situate in Council.
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> "(ii) When any such order has been made a certified copy thereof shall be referred to the State Council by the Collector or Registrar as the case may be together with copies of the record relating thereto.
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> "(iii) The Ruler of the State in Council may, after due inquiry into the circumstances of the particular case, give or refuse consent to the sale, and in particular may give consent thereto subject to the postponement of the date thereof for any stated period not exceeding twelve months.
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> "Any such refusal, consent or postponement may be subject to such conditions and limitations as the Ruler of the State in Council may see fit to impose; provided that it shall be a condition of any refusal or consent or postponement as provided above that not less than seventy-five per cent of any interest which may thereafter become due shall be paid by the proprietor of the small holding in question; and, failing such payment, the refusal or postponement shall cease to have effect and the order of sale shall become operative, provided that if the amount so due be paid at any time previous to the sale, all further proceedings in respect thereof shall be stayed, and the refusal or postponement as aforesaid shall again be of effect.
>
> "(iv) The decision of the Ruler of the State in Council under sub-section (iii) of this section shall be conveyed to the Collector or Registrar as the case may be who shall act in accordance therewith."
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> Section 4 provides that—
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> "4. This Enactment shall remain in force for a period of twelve months from the commencement thereof, and may, at the expiration of that period, be continued in force for further periods not exceeding six months each by order of the Chief Secretary to be published in the Gazette."

The Enactment was continued from time to time under the provisions of Section 4, and finally expired on the 20th July, 1933. See Gazette Notification No. 4119 published in the Government Gazette of the 15th June, 1933.

A certified copy of the order made on the 17th July was not forwarded to the State Council, as provided by section 3 (ii).

An order was made by the Registrar on the 15th day of September, 1933, that the sale should proceed.

It is from that order that this appeal is brought.

It is contended for the appellant that at the date of the order of the 17th July, 1933, there was a statutory duty under Section 3 (ii) to forward a certified copy to the State Council, and that that duty was not affected by the expiration of the Enactment on the 20th July, 1933. The argument is founded on section 15 of the Interpretation and General Clauses Enactment, 1932, which provides as follows:—

> "15. Whenever any written law repeals wholly or in part a former written law, such repeal shall not, in the absence of any express provision to the contrary, affect or be deemed to have affected
>
> "(i) the past operation of or anything duly done or suffered under the repealed written law;

> " (ii) any right, liberty, privilege, obligation or liability acquired, imposed or incurred under the repealed written law;
> " (iii) any offence committed or any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed written law;
> " (iv) any investigation, action, legal proceeding or remedy in respect of any such right, liberty, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, action, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Enactment has not been passed."

In my view the appellant's argument fails because Section 15 only applies where a written law repeals a former written law, and has no application to an Enactment which expires by lapse of time.

I hold that all orders and proceedings under the Enactment expired with it, and have no longer any force or effect. The duty which lay on the Registrar on the 17th July to forward a certified copy of the order to the State Council came to an end on the 20th July.

If any authority is needed for a proposition which appears to me to be obvious, I would refer to the cases cited in Maxwell, 7th Edition, 342 et seq.

The appeal is dismissed with costs.

The Defendant appealed to the Court of Appeal.

M. Morrison for Defendant-Appellant.

While the Enactment was in force there was a statutory duty on the Registrar to forward orders for sale of "Small Holdings" to the Ruler in Council.

It is immaterial that the Enactment has since lapsed. The Trial Judge has treated the expiry of the Enactment in the same way as it would have been treated under English Common law if it had been repealed. Prior to legislation dealing with repeal the effect at Common Law was to obliterate the Enactment completely except for actions concluded before the repeal.

A difference in England exists between temporary and repealed statutes. The survival of restrictions imposed by temporary enactments is a matter of construction—(Parke, B.) *Steavenson* v. *Oliver*, (1841) 8 M. & W. 234. The Small Holdings Enactment gave benefit to 'Small Holders' in the case of orders for sale made during the life of the Enactment. They cannot be divested of that benefit.

The provisions of the Enactment give the Ruler in Council the right to postpone the sale of the land for 12 months. The life of the Enactment was fixed at 12 months with a provision for further extensions of six months at a time. It was the intention of the legislation to give to the Small Holder a benefit in the discretion of the State Council not to exceed 12 months.

The Hon'ble Mr. S. Veerasamy for Plaintiff-Respondent.

After the lapse of the Enactment, the Registrar and the State Council are "*functus officio.*" They derive their powers from the Enactment, which has ceased to exist.

In the absence of special legislation both expired and repealed Enactments are regarded as never having existed. Maxwell 7th Edition page 342 and *Rex* v. *Ellis*; *Ex parte Amalgamated Engineering Union*, 125 L. T. 397.

M. Morrison in reply.

Rex v. *Ellis*, 125 L. T. 397 must be distinguished as it concerned a penalty and Penal Statutes are strictly construed. The principle in *Steavenson* v. *Oliver*, (1841) 8 M. & W. 234 is approved in *Rex* v. *Ellis*.

Cur. Ad. Vult.

THOMAS, C. J.—The question raised by this appeal is as to the effect that the expiration of an Enactment has upon powers conferred by the Enactment which have not been exercised at the date of the expiration of the Enactment.

On the 17th of July 1933 an order had been made by Gerahty, J. declaring that the plaintiff (now the respondent) had a lien over certain lands and directing that a sale be held thereof.

There were several parcels of the land all held under grant and entries in the mukim Register. Although the total acreage exceeded twenty-five acres, it has been admitted that no single parcel exceeded twenty-five acres.

The Small Holdings (Restriction of Sale) Enactment 1931 provided in section 3 that

> " all orders of sale of small holdings made under sections 142, 149 and 134 of the Land Code, 1926 or under section 303 of the Civil Procedure Code, 1918, shall notwithstanding anything contained in the said Enactments, be subject after the commencement of this Enactment, to the consent of the Ruler of the State in which the small holding is situate in Council ";

and in sub-section 2 of section 3 that

> " when any such order has been made a certified copy thereof shall be forwarded to the State Council by the Collector or Registrar as the case may be together with copies of the record relating thereto."

'Small holding' is defined in section 2 as any agricultural land held under entry in the Mukim Register, and also any land comprised in a grant, lease of State land, or certificate of title where the area of the land so comprised does not exceed twenty-five acres.

By section 4 the Enactment was to remain in force for a period of twelve months from the

commencement thereof, and might at the expiration of that period, be continued in force for further periods.

It has been admitted that the Enactment was so extended from time to time and eventually expired on the 20th of July 1933, or three days after the order made by Gerahty, J. On the 27th of July 1933 an application was made to the Registrar as to the conduct of the sale and other matters connected with the sale, but on that day the Registrar made an order that the application should be adjourned generally pending a reference to the State Council. On further consideration, however, the Registrar on the 15th of September 1933 made the order applied for on the 27th of July 1933, and gave instructions for the conduct of the sale, etc.

The respondent appealed from that decision of the Registrar on the ground that he had no power to make that order without first referring the matter to the State Council of Perak. Mudie, J. heard the appeal and dismissed it with costs.

From that decision the original defendant again appeals. It has been urged that section 15 of the Interpretation and General Clauses Enactment No. 27 of 1932 applies, and that thereby rights and liberties acquired are preserved. That section applies to any written law repealed wholly or in part by a subsequent written law, and I agree with Mudie, J. that, in as much that it is not a question of a law which has been repealed but one which has expired, that section is not applicable in the present case.

There are not in the Federated Malay States any provisions similar to those contained in the Acts of 1808 (Acts of Parliament Expiration Act) and 1889 (Interpretation Act).

Under the old law there was little distinction between a law which had been repealed and one which had expired. And "as a general rule unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect"—see Craies on Statute law, 3rd edition, page 342.

Maxwell on the Interpretation of Statutes also says at page 342—(7th edition):

> "When an Act expired or was repealed, it was formerly regarded, in the absence of provisions to the contrary, as having never existed, except as to matters and transactions past and closed."

The position is in my opinion expressed more clearly in Halsbury, volume 27, at page 158, paragraph 303, where a distinction is drawn between a law which has been repealed and a temporary law.

> "A Statute which has been repealed differs from a temporary Statute in that the former, except in so far as it relates to transactions already completed under it, becomes as if it had never existed, while with respect to the latter the extent of the restrictions imposed and that duration of the provisions are matters of construction."

In the case of *Steavenson* v. *Oliver* Lord Abinger, C. B. said:

> "Take the case of a penalty imposed by an Act of Parliament, would not a person who had been guilty of the offence upon which the legislature had imposed the penalty while the Act was in force, be liable to pay it after its expiration?"

Parke, B. said:

> "I am the more disposed to think thus, on the ground that the penalties given by this Act would probably survive its expiration, and that persons who violated its provisions might afterwards be punished in the way pointed out. If it were not so, any person who had violated those provisions within six months prior to the expiration of the Act, would not be liable to punishment at all".

I have referred to other cases such as *Rex* v. *Elizabeth M'Kenzie*, 168 E. R. 881; *Bennet* v. *Tatton*, (1918) W. W. 291; *Hough* v. *Windus*, 12 Q. B. D. 224. These all appear to deal with a Statute which has been repealed and not with a temporary measure.

So it remains to construe the Enactment itself, and I am satisfied that in construing the Enactment the intention of the Enactment must be considered and given effect to.

The intention of the Enactment is that any order obtained for the sale of certain land prior to its expiration should be subject to the consent of the State Council.

Can it be argued that when for any good reason the State Council has not been able to deal with an order made prior to the expiration of the Enactment it is unable to deal with it after the expiration? If such were the case then the strange result would be that the order would be suspended not for the limited period allowed by the Enactment but indefinitely. This might be tantamount to a refusal in any such case. That is certainly not the intention of the Enactment.

In the case of the *Goldsmiths Company* v. *The West Metropolitan Railway Company*, 1 K. B. 1 it was held that a notice to take lands compulsorily served on the last day of the continuation of a temporary Act was in time. That temporary Act incorporated the Lands Clauses Act, 1885. That was the machinery for giving effect to the notice. There was no suggestion in that case that the notice might be in time but would be ineffective because the machinery by which it could be enforced would expire with the Act. It is true that the machinery was not in the Act itself beyond a clause incorporating the machinery. Can it be said that where machinery

is incorporated in an Act by reference, the position is any different from where the machinery is contained in the Act itself? I am unable myself to see any distinction, since on the expiration of the Act the clause incorporating the machinery would go in the same way as where the machinary was set out in the Act. So, if it depended on that alone the necessary machinery would be lacking in the one case and in the other.

I am satisfied that the machinery for giving effect to an Act whether set out in the Act itself or contained in the Act by reference to another Act survives in a temporary Act until the rights and liabilities created by the Enactment have been completed.

In the present case the right or liability of having the consent of the State Council had accrued prior to the 20th of July 1933, and I hold that the machinery for the completion of that right or liability contained in respect of any order obtained prior to the 20th of July 1933.

In my opinion, therefore, this appeal succeeds.

The order of the Registrar dated the 15th of September 1933 must be set aside. The order of the Registrar dated the 27th day of July must be reinstated. The order of Gerahty J. must be forwarded to the State Council in accordance with section 3 (ii) of Enactment No. 8 of 1931.

The appeal is allowed with costs. The appellant will also have the costs in respect of the order of the Registrar dated the 15th of September 1933.

Any money paid into Court as security in respect of this appeal to be paid out to the appellant or the appellant's Solicitor.

GERAHTY, J.—This is an appeal from the judgment of Mudie, J. in which he held that an order for sale dated 17th July, 1933, of certain properties, admittedly small holdings, was not subject to the consent of the State Council under the provisions of section 3 of The Small Holdings (Restriction of Sale) Enactment 1931 which expired on the 20th July, 1933, by virtue of an order made by the Chief Secretary under section 4.

The question for decision by this Court is whether the Registrar should have forwarded a certified copy of the Order for sale to the State Council, in view of the subsequent expiration of the Enactment, and whether the powers of the State Council under section c (iii) remain exercisable after the expiration of the Enactment, which was a temporary measure to restrict sales of small holdings at the instance of chargees and others for the protection of proprietors of small holdings of agricultural land.

The learned Judge held that section 15 of the Interpretation and General Clauses Enactment, 1932, has no application to an Enactment which expires by lapse of time and with this contention I fully agree.

What considerations apply then to an Enactment which expires by lapse of time? In my view these considerations must depend upon the construction of the terms of the expired Enactment itself. See Beal's Cardinal Rules of Legal Interpretation 2nd Edition page 456.

The Enactment provides that all orders for sale in respect of small holdings as defined therein, made under certain sections of the Land Code, 1926, or under section 303 of the Civil Procedure Code, shall be subject after the commencement of the Enactment to the consent of the Ruler of the State in which the small holding is situate. The Enactment is to remain in force for 12 months from its commencement and may be continued in force for further periods not exceeding 6 months each by order of the Chief Secretary. It was in fact so continued up to the 20th July, 1933.

It seems to me on the true construction of section 3 (i) and section 4 that all such orders for sale made after the commencement of the Enactment and prior to its expiration, have been declared to be subject to the consent of the State Council. That being so, does the discontinuance of the Enactment abrogate the powers of the State Council conferred by section 3 (iii) in respect of such orders for sale? To hold that it so abrogates those powers, would, in my opinion, lead to an absurdity—it would be giving retrospective effect to the discontinuance; if all orders made during the continuance of the Enactment are subject to the consent of the State Council, then, surely the discontinuance of the Enactment cannot be construed so as to preclude the State Council from enquiring into the circumstances of the case and from exercising its powers in relation thereto.

In my opinion the discontinuance of the Enactment operates merely as against orders for sale made subsequent to the date of expiration of the Enactment, namely the 20th July, 1933, and that consequently the order for sale dated the 17th July, 1933, should have been forwarded by the Registrar to the State Council under section 3 (ii) of the Enactment and the powers of the State Council under section 3 (iii) remain exercisable in regard thereto. The appeal should accordingly be allowed with costs and the order of the Registrar dated 15th September, 1933, be set aside and his order of the 27th July, 1933, be reinstated.

McFALL, J.—The appellant Moona Sowmian borrowed moneys from the respondent O.R.M.M. S.P.S.V. Meyappa Chettiar on two promissory notes, and deposited his documents of title to his lands as collateral security. Respondent lodged caveats against the lands: the total area of the lands comprised in the titles was 78 acres 2 roods 12 poles. Appellant failed to pay.

On the 17th July, 1933 respondent obtained judgment for a large sum of money and an order

for the sale of the lands. It is undisputed that this order for sale was subject to section 3 of the Small Holdings (Restriction of Sale) Enactment, 1931. On the 20th July, 1933 the Enactment was not continued and expired on that date.

On the 27th July, 1933 on a summons for directions for the sale it was ordered that the application be adjourned generally pending reference to the State Council. On 15th September, 1933 on a summons for further consideration of the summons adjourned on 27th July, 1933 the Registrar gave directions for sale of the lands. Against this order appellant appealed to the Judge at Ipoh which appeal was dismissed on the 16th October, 1933. Appellant now appeals to this Court on three grounds:—

1. That the sale was subject to the consent of the State Council;
2. That the respondent should have appealed against the Registrar's decision of 27th July, 1933;
3. That the appellant is entitled to the protection of the Small Holdings Enactment of 1931.

The Enactment from its short title and provisions is professedly a temporary measure. On 17th July, 1933 respondent held the order for the sale of the lands subject to the express duty of the Registrar to forward the order of sale to the State Council and for the State Council to receive it and consider delaying the operation of the order. On the 20th July, 1933 did the respondent hold his order freed from these drawbacks?

The Enactment sets up as a tribunal the State Council to enquire and give or refuse consent to all Court orders for the sale of small holdings, such orders to be forwarded by the Registrar. On 20th July, 1933 the Enactment was no longer continued by the Chief Secretary to Government, and therefore expired and remained no longer in force in accordance with the provisions in its last section No. 4.

The appellant maintains that he had on 17th July, 1933 acquired a right or privilege under the Enactment which should remain to him. It may be granted that at 17th July, 1933 he had the right to have the order of sale forwarded by the Registrar to the State Council and to be there considered.

But on 20th July, 1933 the Enactment expired and that expiration in the absence of any express provision to the contrary removed the foundation on which rested the State Council's power to take action on these orders and of the Registrar's power to forward such orders. Appellant's right survived and was not taken away from him, but the means whereby it would be made effective for him disappeared, and without those means his right became incapable of being further developed or made effectual.

In *Stevenson* v. *Oliver*, (1841) S.M. & W. 234 (1) it was said that "if an Act expires the duration of its provisions is a matter of consideration." In the absence of express provisions that the State Council should continue to function as a special tribunal for the purposes of this Enactment after the expiration of the Enactment it would be too daring, in the absence of express authority, to hold that the State Council could so continue to function. In the case of *Steavenson* v. *Oliver* the apothecary had fully attained to his right to practise as such during the continuance of the Act and it was held that his right to practise continued after the Act had expired. The apothecary's right was complete and required no machinery to perfect or assist it after the expiration of the temporary Act. The apothecary was in a position analogous to that in which the appellant would have been had the State Council considered this order for sale and refused consent to the sale. Appellant's right would then have been perfected and could not be negatived as nothing further could be done with or against it. But in the case appellant's right depends on the existence and functioning of machinery which no longer exists.

I am of opinion that the appeal fails in all points and should be dismissed with costs.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]
MUDIE, J.

November, 17, 1933.

CHOW KWAN.....Appellant.

v.

PUBLIC PROSECUTOR.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 121 of 1933]

Criminal Procedure Code, s. 172 (iii)— Prosecution's right of reply where a point of law is taken but no evidence has been adduced for the defence.

Where the defence leads no evidence but raises a point of law in a criminal trial before a Magistrate, the Court may hear the prosecution on the point but in such a case the defence must be afforded an opportunity of replying to the arguments of the prosecution.

George Terrell for Appellant.

L. C. Simpson-Gray, Deupty Public Prosecutor, for Respondent.

MUDIE, J.—A point was raised by the Appellant which is of some importance to Magistrates. Though the accused had not adduced any evidence, the learned Magistrate asked the officer conducting the prosecution if he had anything to say on the points of law raised by the defence.

It is provided by section 172 of the Criminal Procedure Code, 1926, that